

- determined that he satisfied criteria to be included in both the “physical disability” and the “developmental disability per FEDERAL definition” target groups. (Exhibit 9, p. 1 and 9).
3. For an unspecified period of time prior to June 23, 2016, petitioner received 15 hours per month of supportive independent living services and representative payee services through the Family Care Program. (Testimony of Respondent witness, [REDACTED]).
 4. On June 9, 2016, petitioner underwent a review of his eligibility for Family Care. As part of that process, My Choice Family Care Managed Care Organization (“My Choice”) reviewed his functional abilities and limitations. On June 23, 2016, information regarding petitioner’s functional abilities and limitations was entered into the department’s long term care functional screen (LTCFS) report. The LTCFS results indicated that the petitioner’s level of care have changed from “nursing home” to “non-nursing home”. The LTCFS results further indicated that petitioner no longer satisfies criteria necessary to be included in the “physical disability” and “developmental disability per FEDERAL definition” target groups but that he continues to meet criteria required to be included in the “developmental disability per STATE definition” target group. (Testimony of Respondent witnesses, [REDACTED] and [REDACTED]).
 5. On June 23, 2016, My Choice issued a “Notice of Change in Level of Care” alerting the petitioner of the result of the LTCFS. (Exhibit 3).
 6. On June 27, 2016, My Choice issued a “Notice of Action” to the petitioner both alerting him to the change in his level of care and of the impact of that change; namely, that he remained eligible for enrollment in Family Care but that he was no longer eligible to receive supportive independent living services and representative payee services. (Exhibit 2).
 7. On July 26, 2016, My Choice completed a second LTCFS and the LTCFS results again indicated that petitioner was no longer functionally eligible for Family Care at a “nursing home level of care.” (Exhibit 8).
 8. On July 14, 2016, petitioner filed a timely request for fair hearing and has been receiving continuing benefits pending the outcome of this appeal.
 9. Petitioner is 44 years old. He has diagnoses of intellectual disability, fetal alcohol syndrome, hypercholesterolemia, chondromalacia, cataracts, and left patellar instability. The Social Security Administration has determined that the petitioner qualifies for benefits as a result of his intellectual disability. (Exhibit 8).
 10. Petitioner is able to independently and safely perform all activities of daily living (i.e., bathing, dressing, grooming, eating, toileting, and transferring.) (Exhibit 8 and Testimony of Petitioner).
 11. Petitioner is able to safely and appropriately perform the following instrumental activities of daily living: simple meal preparation; management and administration of medications; and use of the telephone. Petitioner needs some assistance to prepare more complicated recipes. (Exhibit 8 and Testimony of Respondent).

Petitioner requires assistance to safely and appropriately complete certain instrumental activities of daily living. Specifically, petitioner requires assistance to properly launder his clothes as he is unable to determine the proper amount of detergent to use. In addition, petitioner would require assistance were he to need to use a lawn mower or snow blower. Petitioner also requires assistance with money management as he does not understand monetary denominations. Petitioner is not employed. Were he to obtain employment, he would need assistance “to problem solve anything outside of his routine job duties.” As a result of cognitive delays, petitioner is unable to drive. (Exhibit 8, Testimony of Respondent).

DISCUSSION

Family Care (FC) is a Medical Assistance funded program intended to meet the long term care and health care needs of target groups consisting of frail elders; individuals age 18 and older who have physical disabilities, as defined in Wis. Stat. §15.197 (4) (a) 2.; and individuals age 18 and older who have developmental disabilities, as defined in Wis. Stat. §51.01 (5) (a). Wis. Stat. §46.286; Wis. Admin. Code ch. DHS 10; Family Care 1915(c) Home and Community-Based Services Waiver¹; and *Medicaid Eligibility Handbook (MEH)*, §29.1. Wis. Admin. Code §DHS 10.33(2) and Wis. Stat. §46.286 further provide that to be eligible for enrollment in Family Care, an individual must need a “nursing home” (i.e., comprehensive) or “non-nursing home” (i.e., intermediate) level of care. Family Care enrollees shown to need a nursing home level of care are eligible for an array of long term care and health care services through a managed care organization (MCO). Family Care enrollees shown to need the less intensive non-nursing home level of care are eligible to receive a far more limited array of services. Wis. Admin. Code §DHS 10.33(2); §DHS10.36(1)(b); 2016 State of Wisconsin Department of Health Services Family Care Programs Contract Article III.A.3.²

In this case, the department found that even after the most recent LTCFS, the petitioner continues to fall within the “developmental disability” target group, as that term is defined by state statute. See Wis. Stat. §51.01(5)(a). The primary issue that must be decided therefore is whether the petitioner is in need of a “nursing home level of care”. If he is not, he is in turn not eligible for the supportive independent living services and representative payee services that he has been receiving.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. Thus, the burden falls upon My Choice to prove that it had a reasonable basis upon which to reduce the petitioner’s level of care.

To determine an individual’s functional capacity, the MCO, in this case, My Choice, gathers information through an extensive interview of the applicant/participant and his family. The information is then entered into a computer program that produces a Long Term Care Functional Screen Report, which ultimately determines the individual’s level of care. While the information gathered during the screening process and the contents of the Long Term Care Functional Screen Report are clearly relevant at a fair hearing where a Family Care applicant’s or enrollee’s level of care is in dispute, the logic or algorithm built into that screen can direct a level of care finding that is inconsistent with the state regulations that govern the Family Care program. As the Division of Hearings and Appeals has observed in several previous hearing decisions, where such a conflict occurs, the existing regulations must control the outcome. See, e.g., DHA Case # FCP-168914 (January 6, 2016) and DHA Case #FCP-166950 (October 6, 2015).

Wis. Admin. Code, §DHS 10.33(2)(c) describes the nursing home level of care as follows:

A person is functionally eligible at the comprehensive level [i.e., nursing home level of care] if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

¹ Available at <https://www.dhs.wisconsin.gov/familycare/statefedreqs/fc1915cwaiver.pdf>

² Available at <http://mltc.wisconsin.gov/2016/>

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

“Activities of Daily Living” or “ADLs” are, in turn, defined as bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet. Wis. Adm. Code §DHS 10.13(1m).

"Instrumental activities of daily living" or "IADLs" are, in turn, defined as management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation, and the ability to function at a job site. Wis. Admin. Code §DHS 10.13 (32). In addition, the LTCFS tool lists “Laundry and/or Chores” as an IADL. And, the testimony of the staff from My Choice who participated in the hearing clearly indicated that the petitioner’s ability to perform laundry/chores was carefully assessed as part of the functional screening it performed. It is thus clear that departmental policy considers the performance of laundry and chores to be an IADL. Federal Medicaid regulations also provide a definition of IADLs which includes, in relevant part, the performance of essential household chores. See 42 C.F.R. 441.505.

The petitioner’s ability to safely and appropriately perform all activities of daily living is not in dispute. And, My Choice acknowledged that he needs assistance with the following instrumental activities of daily living: 1. money management; 2. transportation; 3. employment; and 4. laundry/chores. Because the petitioner does have a cognitive impairment and because he lacks the ability to safely or appropriately perform four IADLs, he meets the standard for “nursing home” or “comprehensive” level of care that is set forth in the Wisconsin Administrative Code.

CONCLUSIONS OF LAW

Petitioner is functionally eligible for Family Care at the comprehensive/nursing home level of care.

THEREFORE, it is

ORDERED

That the petition be remanded to My Choice and that the agency amend the Long Term Care Functional Screen to reflect that the petitioner has a nursing home / comprehensive level of care. My Choice shall take steps to do this within ten days.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

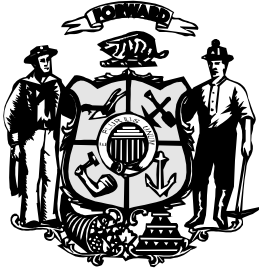
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 2nd day of September, 2016

\s _____
Teresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 2, 2016.

MY Choice Family Care
Office of Family Care Expansion
Health Care Access and Accountability